

JERRY O. STEWART, )  
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Plaintiff, )  
)  
v. ) No. 1:10CV40 SNLJ  
)  
CAPE GIRARDEAU COUNTY )  
SHERIFF’S DEPARTMENT, et al., )  
)  
Defendants. )

This matter is before the Court upon the motion of plaintiff (registration no. 1187520), an inmate at Eastern Reception, Diagnostic and Correctional Center, for leave to commence this action without payment of the required filing fee [Doc. #2]. For the reasons stated below, the Court finds that plaintiff does not have sufficient funds to pay the entire filing fee and will assess an initial partial filing fee of \$.28. See 28 U.S.C. § 1915(b)(1). Furthermore, based upon a review of the complaint, the Court finds that the complaint should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).

Pursuant to 28 U.S.C. § 1915(b)(1), a prisoner bringing a civil action in forma pauperis is required to pay the full amount of the filing fee. If the prisoner has

insufficient funds in his or her prison account to pay the entire fee, the Court must assess and, when funds exist, collect an initial partial filing fee of 20 percent of the greater of (1) the average monthly deposits in the prisoner's account, or (2) the average monthly balance in the prisoner's account for the prior six-month period. After payment of the initial partial filing fee, the prisoner is required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency having custody of the prisoner will forward these monthly payments to the Clerk of Court each time the amount in the prisoner's account exceeds \$10, until the filing fee is fully paid. Id.

Plaintiff has submitted an affidavit and a certified copy of his prison account statement for the six-month period immediately preceding the submission of his complaint. A review of plaintiff's account indicates an average monthly deposit of \$1.42, and an average monthly balance of \$.21. Plaintiff has insufficient funds to pay the entire filing fee. Accordingly, the Court will assess an initial partial filing fee of \$.28, which is 20 percent of plaintiff's average monthly deposit.

### **28 U.S.C. § 1915(e)**

Pursuant to 28 U.S.C. § 1915(e)(2)(B), the Court must dismiss a complaint filed in forma pauperis if the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune

from such relief. An action is frivolous if it “lacks an arguable basis in either law or fact.” Neitzke v. Williams, 490 U.S. 319, 328 (1989). An action is malicious if it is undertaken for the purpose of harassing the named defendants and not for the purpose of vindicating a cognizable right. Spencer v. Rhodes, 656 F. Supp. 458, 461-63 (E.D.N.C. 1987), aff’d 826 F.2d 1059 (4th Cir. 1987).

To determine whether an action fails to state a claim upon which relief can be granted, the Court must engage in a two-step inquiry. First, the Court must identify the allegations in the complaint that are not entitled to the assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950-51 (2009). These include “legal conclusions” and “[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements.” Id. at 1949. Second, the Court must determine whether the complaint states a plausible claim for relief. Id. at 1950-51. This is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Id. at 1950. The plaintiff is required to plead facts that show more than the “mere possibility of misconduct.” Id. The Court must review the factual allegations in the complaint “to determine if they plausibly suggest an entitlement to relief.” Id. at 1951. When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in

determining whether plaintiff's conclusion is the most plausible or whether it is more likely that no misconduct occurred. Id. at 1950, 51-52.

### **The Complaint**

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 alleging unnamed violations of his civil rights. Named as defendants are: the Cape Girardeau County Sheriff's Department; the Nursing Staff at the Sheriff's Department; Unknown Jordan (Sheriff); Unknown Mulcahy (police officer); and Unknown Brockmire (police officer).

Plaintiff claims that after engaging in a physical altercation with another inmate, unknown officers moved his "enemy" into his pod. Plaintiff says that when he complained about the move, defendant Brockmire told him it would take four days to move the other inmate to a different pod. Plaintiff claims that he felt he was in "imminent danger" during the four days he was made to wait to have the other inmate moved. Plaintiff does not claim that he had another altercation with this particular inmate, only that he was fearful of such an altercation occurring.

Plaintiff asserts that several months later he engaged in an altercation with a second inmate and that he suffered cuts to his upper lip as a result of the fight. Plaintiff claims that he was prescribed antibiotics which made him sick to his

stomach, but that the unnamed nurse on duty told him to continue taking the medicine. Plaintiff does not allege any other ill effects of the medicine.

Plaintiff alleges that several weeks later he had pain in his groin and periodically suffered from dizzy spells. Plaintiff claims that this went on for three months and that he complained to an unnamed person on the nursing staff about the dizzy spells several different times. Plaintiff asserts that more than three months later he was informed that the pain in his groin was the result of a hernia. He states that the unnamed nurse told him that because his transfer to the Missouri Department of Corrections was set to occur in the next couple of weeks, “they” would let the prison take care of treating the hernia.

### **Discussion**

Plaintiff’s conclusory claims against the Cape Girardeau Sheriff’s Department and its Nursing Staff are legally frivolous because the Sheriff’s Department is not a suable entity. Ketchum v. City of West Memphis, Ark., 974 F.2d 81, 82 (8th Cir. 1992) (departments or subdivisions of local government are “not juridical entities suable as such.”); Catlett v. Jefferson County, 299 F. Supp. 2d 967, 968-69 (E.D. Mo. 2004).

Moreover, plaintiff’s failure to identify exactly which alleged violation was caused by each named defendant is fatal to his claims for relief. “Liability under §

1983 requires a causal link to, and direct responsibility for, the alleged deprivation of rights.” Madewell v. Roberts, 909 F.2d 1203, 1208 (8th Cir. 1990); see also Martin v. Sargent, 780 F.2d 1334, 1338 (8th Cir. 1985) (claim not cognizable under § 1983 where plaintiff fails to allege defendant was personally involved in or directly responsible for incidents that injured plaintiff); Boyd v. Knox, 47 F.3d 966, 968 (8th Cir. 1995) (respondeat superior theory inapplicable in § 1983 suits). In the instant action, plaintiff has not named particular defendants in his complaint, with the exception of defendant Brockmire.<sup>1</sup> Nor has he set linked any specific allegations regarding violations of his constitutional rights to any specific defendants. As a result, the complaint fails to state a claim upon which relief can be granted.

Lastly, the complaint is silent as to whether defendants are being sued in their official or individual capacities. Where a “complaint is silent about the capacity in which [plaintiff] is suing defendant, [a district court must] interpret the complaint as including only official-capacity claims.” Egerdahl v. Hibbing Community College, 72 F.3d 615, 619 (8th Cir.1995); Nix v. Norman, 879 F.2d 429, 431 (8th Cir. 1989). Naming a government official in his or her official capacity is the equivalent of

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<sup>1</sup>Plaintiff’s allegations against defendant Brockmire consist only of his assertion that Brockmire told him it would take four days to move his “enemy.” This allegation, in and of itself, fails to form the basis for a constitutional violation.

naming the government entity that employs the official. To state a claim against a municipality or a government official in his or her official capacity, plaintiff must allege that a policy or custom of the governmental entity is responsible for the alleged constitutional violation. Monell v. Department of Social Services, 436 U.S. 658, 690-91 (1978). The instant complaint does not contain any allegations that a policy or custom of a governmental entity was responsible for the alleged violations of plaintiff's constitutional rights. As a result, the complaint fails to state a claim upon which relief can be granted.

Accordingly,

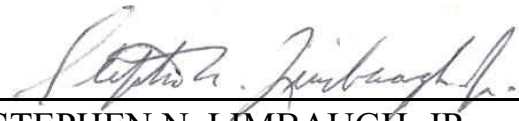
**IT IS HEREBY ORDERED** that plaintiff's motion to proceed in forma pauperis [Doc. #2] is **GRANTED**.

**IT IS FURTHER ORDERED** that the plaintiff shall pay an initial filing fee of \$.28 within thirty (30) days of the date of this Order. Plaintiff is instructed to make his remittance payable to "Clerk, United States District Court," and to include upon it: (1) his name; (2) his prison registration number; (3) the case number; and (4) that the remittance is for an original proceeding.

**IT IS FURTHER ORDERED** that the Clerk shall not issue process or cause process to issue upon the complaint because the complaint is legally frivolous or fails to state a claim upon which relief can be granted, or both.

An Order of Dismissal will accompany this Memorandum and Order.

Dated this 8th day of April, 2010.



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STEPHEN N. LIMBAUGH, JR.  
UNITED STATES DISTRICT JUDGE